NO. 80-235

Supreme Court, U. S.
FILED
AUG 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

CORNELIA CRENSHAW,
Plaintiff-Appellant,

v.

HONORABLE RAY BLANTON,
Governor of Tennessee; and
GENTRY CROWELL,
Defendants-Appellees.

On Appeal from the Supreme Court of Tennessee

JURISDICTIONAL STATEMENT

HUBERT D. PATTY
P. O. Drawer L
Maryville, Tennessee 37801
1-615-982-0370

Attorney for Plaintiff-Appellant

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202
8-11-80-50

QUESTIONS PRESENTED

Where Tennessee Constitution provides for two methods for amending the Constitution, one of which is to authorize the legislature to enact a law calling for a Constitutional Convention and where the legislature attempts to use such method, Tennessee Public Acts 848 (1976), but fails to comply with the Constitution in enacting laws, by refusing to submit the bill to the Governor and where the speakers of each house do not properly sign the bill, does such failure to comply with the constitutional provisions deprive citizens of due process and equal protection of the laws as guaranteed by the 14th Amendment to the Constitution of the United States?

The second question is whether where the legislature has violated the constitutional provisions for amending a Constitution in calling a Constitutional Convention, can an approval by a vote of the people validate such unconstitutional act?

Third, whether or not equal protection is denied where the Appellate Court of a state finds that the legislature has failed to comply with the constitutional provisions in regard to amending the Constitution but said Court will not grant relief from such constitutional violations on the basis that it would interfere with the orderly framework of government?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the Supreme Court of Tennessee, dated May 19, 1980, is unreported as well as the Opinion of the Court of Appeals of Tennessee filed on the 28th day of March, 1980, attached hereto as Appendix A.

JUDGMENT SOUGHT TO BE REVIEWED

Appellant appeals from the judgment of the Supreme Court of Tennessee entered on the 19th day of May, 1980, in which the Supreme Court of Tennessee denied permission to appeal from a judgment of the Court of Appeals of Tennessee entered on the 28th day of March, 1980, affirming the judgment of the Chancery Court of Davidson County, Tennessee, entered on the 29th day of June, 1979, denying summary judgment on behalf of the plaintiff. Notice of Appeal was filed in the Supreme Court of Tennessee on the 24th day of July, 1980, Appendix C.

STATUTORY BASIS

Jurisdiction of the Supreme Court to review the final judgment of the Supreme Court of Tennessee is conferred by *28 USCS Section 1257 (2)*.

STATUTES INVOLVED

Tennessee Constitution, Article XI, Section 3, para. 2, reads as follows:

> "The legislature shall have the right by law to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform or abolish any specified part or parts of it; and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall approve the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and manner as shall be prescribed. No change in, or amendment to, this Constitution proposed by such con-

vention shall become effective, unless within the limitations of the call of the convention, and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such date as may be fixed by the convention."

Application of this amendment was brought about by a purported act of the Tennessee Legislature designated as Tennessee Public Acts, Chapter 848, of 1976, which authorized a referendum on the question of calling a constitutional convention.

The Public Act was not submitted to nor signed by the governor of Tennessee, nor by the speakers of the house of the General Assembly in open session as required by the Constitution.

In this regard the Tennessee Constitution, Article III, Section 18, provides as follows:

"*Bill Approved by the Governor.*—

Every bill which may pass both houses or the General Assembly shall, before it becomes a law, be presented to the governor for his signature."

Tennessee Constitution, Article II, Section 18, provides:

"No bill shall become a law until it shall have been read and passed . . . . and shall have been signed by the respective speaker in open session, the fact of such signing to be noted on the Journal; and shall have received approval of the governor, or shall have been otherwise passed under the provisions of this Constitution."

STATEMENT OF THE CASE

In this proceeding, the facts of the case are set out in some detail in the opinion of the Court of Appeals attached hereto (Appendix B). A brief summary is as follows:

On March 19, 1976, the last day of the session of the General Assembly of Tennessee, a bill was voted to authorize an election on the question of calling of a constitutional convention. The bill was designated "Public Acts 1976, Chapter 848".

This was one of two methods of amending the Constitution of the State of Tennessee as provided in Article XI, Sec. 3, para. 2, of the Constitution of Tennessee. This type of amendment required a regular enactment of *a law* just as any other bill of the legislature, and under Article III, Sec. 18, of the Constitution of Tennessee, it was necessary for such bills to be approved by the governor or enacted over his veto. The Tennessee Constitution likewise in Article II, Sec. 18, provided that all such bills should be signed by the speaker of each house of the legislature in open session.

There was no compliance with either of these constitutional provisions in enacting the law authorizing the calling of a constitutional convention.

Pursuant to the provisions of the above Public Acts of 1976, a Constitutional Convention was held and proposed certain amendments to the Constitution of Tennessee which radically changed the form of government and was submitted to the people of Tennessee on March 7, 1978.

Approximately ten (10%) percent of the registered voters of Tennessee voted to adopt all of the amendments except the one reforming the judicial system of Tennessee. (Letter of Coordinator of Elections)

The appellant pursuant to provisions of the Tennessee Code Annotated filed an election contest seeking to declare all of the proceedings void and unconstitutional.

The original complaint contained several grounds for the contest, including various unlawful acts, but in order to expedite a disposition of the matter, dismissed all of the grounds except failure of the legislature to submit the Act to the governor authorizing the call of the convention, failure of the speaker of each house to sign such bills in open session, all as required by the Constitution of Tennessee.

Motion for summary judgment was denied and the appellant exhausted all of her remedies to the highest Court of the State of Tennessee.

The appellant now seeks relief in the United States Supreme Court from the final judgment of the Supreme Court of Tennessee entered on May 19, 1980, which is the court of last resort in Tennessee.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The opinion of the appellate court of Tennessee, which denied the appellant relief provided in part as follows:

> "This Court cannot agree with the defendants that the Constitution does not require the signature of the Governor on a measure submitting to the voters the question of calling a constitutional convention, even a limited constitutional convention such as that involved in the present suit. There are two reasons for this position.
>
> First, Article XI, above, provides that the legislature may *by law* submit a proposal for a constitu-

tional convention. That is what happened in the present case. Articles II and III above, require that every bill shall be presented to the governor *before it becomes a law.*

Therefore, before the action of the legislature in the present case could become a law, it was necessary that it be submitted to the governor. Not having been so submitted, it could not become *a law*, and the action of the legislature, not being accomplished by law, was not taken in compliance with the Constitution.

The other reason why the governor's signature is required is likewise based upon the same two provisions of the Constitution. Article III, Section 18, quoted above, provides that all other actions of legislature (joint resolutions or orders), shall be presented to the governor, except on questions of adjournment, and proposals of specific amendments to the Constitution. It cannot be successfully contended that the submission to the voters of a proposal for a limited constitutional convention is contemplated by the exemptions just mentioned. In the first place, the proposal of a convention was not a proposal of specific amendments, but of a convention to consider amendments in specific areas. In the second place, Article XI, quoted above, specifies two separate and distinct methods of amending the Constitution.

. . . This Court holds that the legislative action involved in the present case should have been presented to the governor as required by Section 3."

The people of Tennessee in the first article and first section of their Constitution reserved unto themselves the right

to alter, reform or abolish the government in such manner as they may think proper and in the same Constitution by the Sections quoted above, place limitations upon amending the Constitution. Any other method of changing the form of government is revolutionary. The four million people of Tennessee expected no change to be permitted their Constitution except by a proper enactment of *a law*.

Under the unconstitutional act of the legislature, ten (10%) percent of the people radically changed the Constitution of Tennessee for the people without their consent. (See Appendix B).

The view on this matter by the Supreme Court of the United States has been summarized as follows:

> "It is settled that amendments to State Constitutions are to be made only in modes pointed out or sanctioned by the instrument itself, the legal exponent or the will of the majority, which alone is entitled to the force of law, none of the prerequisite steps may be omitted, not withstanding that certain steps are less essential than others, it follows that every power of a Constitution conferred on the legislature in reference to proposing an amendment as well as calling a convention must be strictly construed. (Livermore vs. Waite, 102 Cal. 113, 36 P. 424; Marshall vs. Dye, 178 Ind. 336, 99 N.E. 1, 34 S. Ct. 92)
>
> Any attempt to revise a constitution or adopt a new one in any manner other than provided in the existing instrument is almost invariably treated as extra constitutional and revolutionary.
>
> Thus, even if the vote of the people should be overwhelmed in adoption of a constitution formulated by a

> convention not legally called, it would be the duty of the executive and the judiciary and all officers to the utmost the installation of government under the new revolutionary constitution. If overpowered, the new government would be established, not by peaceful means but by extra revolution. (Taylor vs. Becham, 178 U.S. 458, 44 L. Ed. 1187, 20 S. Ct. 890).

The Supreme Court of the United States has repeatedly held that a vote of the people cannot validate and constitutionalize anything which violates a provision of the Constitution, and that the question as to the constitutionality is always open, even after voters have adopted such a provision as the Court has pointed out in the following cases:

Baker vs. Carr, 369 U.S. 186; *Reynolds vs. Sims*, 377 U.S. 533; *Westberry vs. Sanders*, 376 U.S. 1, *Lucas vs. 44th General Assembly of Colorado*, 377 U.S. 713; *Gordon vs. Silver*, 381 U.S. 415; *Hunter vs. Erickson*, 398 U.S. 385.

TENNESSEE SUPREME COURT HAS EARLIER HELD THAT THE CONSTITUTIONAL REQUIREMENTS ARE NECESSARY IN A CASE DETERMINED IN THE SUPREME COURT IN 1951

The legislature passed a general education bill as Chapter 132, Public Acts 1951. After the legislature adjourned it was learned that the bill did not contain certain amendments passed by the house and that certain amendments were never approved nor signed by the speakers of the house and senate nor the governor. The Supreme Court declared the same to be void for those reasons and said this:

> "From the Legislative Journal, two things are undisputed:

(1) That the bill as it was signed by the speakers and governor never passed the house. (2) That the house amendments providing for the provisions for high school funds were never signed and approved by the speakers of the two houses and the governor.

Under these facts and circumstances, which are not in dispute, the city of Nashville filed this bill in the Chancery Court, seeking to have the Chancellor insert in the bill Chapter 132, Public Acts 1951, the two house amendments which had passed both branches of the Legislature, which had never received the approval or signature of the speakers and the governor.

. . . Under our Constitution, the mere passage of a bill by both houses of the Legislature, does not constitute legislative due process, nor make a law. The enactment of statutory law is complete only after combined action of the legislature and executive branches of the government. All elements of the legislative process are set out at length and made mandatory by our Constitution. (Article II, Sec. 18.) . . . Since the house amendments of which the complainants contend under this assignment were never signed by the speakers nor presented to the governor, and since those elements were mandatory prerequisites of the constitutional enactment of a statute, correctness of the Chancellor's decree holding the house amendments are not the law, need no other support than a reading of the foregoing section of the Constitution. . . . A legislative act does not become a law before its approval by the governor, or its constitutional pas-

sage over its objection. The executive is thus under Section 18, Article II, a 'necessary constitutent' of the law making power."

City of Nashville vs. Browning
(1951) 192 Tenn. 597, 241
S.W.2d 583

CONCLUSION

The constitutional questions presented by this appeal are substantial and of great public importance. The record is undisputed that there has been a gross violation of constitutional provisions of the State of Tennessee in regarding changing of the government and that it was accomplished in such an unlawful manner and by such a small group of people as to deny the people of Tennessee their basic rights.

It is clear from prior decisions of the Supreme Court of the United States that this type of conduct violates the rights under the 14th Amendment to the Constitution of the United States, denying due process of law and equal protection to the citizens of Tennessee.

The judgment of the Tennessee Court should be reversed both on the merits and as to the cost with allowance of attorney fees to appellant. (See 42 U.S.C.S. (1976) 1 (e).)

It is respectfully submitted that probable jurisdiction should be noted and placed upon the Court's docket at an early date.

Respectfully submitted,

HUBERT D. PATTY
P.O. Drawer L
Maryville, Tennessee 37801

Attorney for Appellant

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CORNELIA CRENSHAW, Appellant	)	
VS	)	Davidson Equity
HONORABLE RAY BLANTON, Governor of Tennessee and GENTRY CROWELL, Appellees	)	

IN RE: APPLICATION FOR PERMISSION TO APPEAL OF CORNELIA CRENSHAW

(Filed May 19, 1980)

Upon consideration of the application for permission to appeal of Cornelia Crenshaw, the answer of the Honorable Ray Blanton, Governor of Tennessee and Gentry Crowell, the opinion of the Court of Appeals and record in the cause,

Permission to appeal is denied at the cost of appellant.

PER CURIAM

Appendix A

CORNELIA CRENSHAW Plaintiff-Appellant	)	
VS.	)	DAVIDSON EQUITY
HONORABLE RAY BLANTON, Governor of Tennessee, and GENTRY CROWELL Defendants-Appellees	)	

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

(Filed May 23, 1980)

APPEAL FROM PART 3, CHANCERY COURT, DAVIDSON COUNTY, TENNESSEE

THE HONORABLE ROBERT S. BRANDT, CHANCELLOR

FILED: May 23, 1980

HUBERT D. PATTY
P. O. Drawer L
Maryville, TN 37801
ATTORNEY FOR PLAINTIFF-APPELLANT

EVERETT H. FALK, Deputy Attorney General
WILLIAM W. HUNT, III, Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37219
ATTORNEYS FOR DEFENDANTS-APPELLEES

HENRY F. TODD
JUDGE

AFFIRMED & REMANDED

Appendix A

[Caption Omitted]

OPINION

The plaintiff, Cornelia Crenshaw, has appealed from the Chancellor's decree dismissing her suit challenging the validity of Chapter 848, Public Acts of 1976, being the action of the General Assembly providing for a referendum upon the calling of a constitutional convention.

The immediate precipitating cause of the dismissal was plaintiff's failure to properly respond to defendant's demand and the Chancellor's order for discovery. Appellant makes no question of the final action of the Chancellor, but asserts as error the previous action of Chancellor in overruling plaintiff's motion for summary judgment.

[2]

That is to say, plaintiff insists that the Chancellor should have granted summary judgment in her favor and that, had he done so, there would have been no occasion for the subsequent dismissal.

Plaintiff's original pleading, filed on March 15, 1978, was entitled, "Complaint to Contest Election", and sought an injunction to restrain the Governor from issuing a proclamation of the results of an election held on March 7, 1978, to ratify certain constitutional amendments proposed by the Limited Constitutional Convention of 1977. The grounds of the complaint were:

1. Failure of the Governor to sign the legislation authorizing the call of the convention.

2. Illegal acts of the convention.

3. Illegalities in the election.

On April 17, 1978, plaintiff was permitted to amend her complaint to allege that the Speakers of the House and the Senate failed to sign the bill authorizing the convention in the manner provided by the constitution.

Contrary to the statements in the complaint, above, and of plaintiff's motion, below, Chapter 848, Public Acts of 1976, did not authorize a constitutional convention. It merely authorized a public referendum to see whether the voters favored a convention.

All grounds alleged in the complaint and amendment were denied in the answer.

On May 12, 1978, plaintiff filed the following motion:

> "In this cause comes the plaintiff and moves the Court for summary judgment in this cause and all of the relief sought in the Complaint upon the following grounds:
>
> [3]
>
> The basis for the Limited Constitutional Convention of 1977, and its resulting action therefrom depended upon the validity of the Public Acts of 1976, Chapter 848.
>
> That Act is void inasmuch as it was not signed or approved by the Governor of Tennessee, which is required by the Constitution of Tennessee, nor properly signed by the Speakers of the House and Senate.
>
> "Bill approved by the Governor.-
> Every Bill which may pass both Houses of the General Assembly shall, before it becomes a law, be presented to the Governor for his signature."
>
> Every joint resolution or order (except on questions of adjournment and proposals of specific amend-

ments to the Constitution) shall likewise be presented to the Governor for his signature."

Tenn. Const. Art. 3, Sec. 18

"No Bill shall become a law, until it shall have been read and passed , . . . and shall have been signed by the respective speaker in open session, the fact of such signing to be noted on the Journal; and shall have received the approval of the Governor, or shall have been otherwise passed under the provisions of this constitution."

Tenn. Const. Art. 2, Sec. 18

All other Acts calling for Constitutional Conventions have been signed by the Governor.

"Every Bill, joint resolution, or order, except on questions of adjournment and proposals of specific amendments to the Constitution, shall after the same has been passed, enrolled, and signed by the speakers of both Houses of the General Assembly, be presented by the Committee on enrolled Bills of that House wherein such Bill, joint resolution or order originated to the Governor for his signature."

T.C.A. 3-203

"Approval of Governor.- If the Governor approved the bill, joint resolution, or order, he shall write upon the same, to the left of and below the signature of the speaker of the Houses, the true fact and date of his approval, as follows: 'Approved ___, 19__, and shall sign the same as follows: _____, Governor.'"

T.C.A. 3-203

[4]

The attached certificate of the Secretary of State, the affidavits of the speakers of the House and Senate indicate that the Governor did not sign nor in any manner approve Chapter 848, of the Public Acts of 1976, or that the speakers properly signed said act."

No affidavit of the Speaker of the House is found in the record. On June 23, 1978, a certificate of the Secretary of State was filed, contents of which will be hereafter discussed in detail. An affidavit of the Speaker of the Senate was filed on July 5, 1978, as follows:

"I, John S. Wilder, being duly sworn according to law, depose and say:

1. That he is the duly elected Speaker of the Senate of the Ninetieth General Assembly.

2. That several bills passed the Senate on the last day of the Session one of which being House Bill 290.

3. That it is not known exactly when House Bill 290 was signed, but as a practical matter it would have been impossible for that bill to have been engrossed prior to the adjournment; therefore, it is verily believed that House Bill 290 was signed after the Ninetieth General Assembly adjourned sine die."

It will be observed from the above that the affidavit of the Speaker of the Senate, above, does not assert that the enactment was not signed by him in accordance with the constitutional requirement, but that "it is not known when . . . as a practical matter it would have been impossible

. . . it is verily believed that House Bill 290 was signed after the Ninetieth General Assembly adjourned sine die." This is convincing, but not conclusive evidence of the tardy signing of the bill.

Before the Chancellor and before this Court, defendants rely upon the Legislative Journals which record the proper signing of the bill.

[5]

In this state of the record, the Chancellor was certainly justified in ruling that there was an issue of fact as to the time when the bill was signed in the Senate, and this Court concurs in his ruling.

The certificate of the Secretary of State, referred to above, is, in some respects, a curious document. The certificate, itself, is in the usual form, attesting that

> "the annexed is a true copy of Public Chapter 848 of the Public Acts of 1976 (House Bill 290, Senate Bill 388) the original of which is now on file and a matter of record in this office."

The first six pages attached to the certificate purport to be photostatic copies of pages from the published reports of the Public Acts of the General Assembly. However, on the first page, in the margin is printed with pen and ink the following:

> "This Bill was enacted pursuant to Article II, Section 3 of the Constitution, and does not require the approval of the Governor."

On the sixth page of the attachment, the text of the acts ends abruptly at the conclusion of Section 12, without any date of enactment or signatures, as is usual in the prepara-

tion, printing and publication of legislative acts. The seventh page of the attachments consists simply of a typed repetition of the last quotation above of the marginal note on the first page. The eighth page of the attachment consists of a letter from Robert H. Roberts, "Advocate General", on the letterhead of the Attorney General of Tennessee.

The ninth page consists of a letter from the Chief Engrossing Clerk of the House of Representatives to the Secretary of State instructing that House Bill 290 be filed without referring same to the Governor for action.

[6]

The tenth page of the attachment purports to be another letter from the same Robert H. Roberts on the letterhead of the Attorney General of Tennessee advising him that a call for a constitutional convention need not be referred to the Governor.

The eleventh page of the attachment contains the following:

"HOUSE BILL NO. 290
PASSED: March 29, 1976

/s/ Ned R. McWherter
SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/ John S. Wilder
SPEAKER OF THE SENATE

APPROVED this ___ day of _____ 19___

_____
GOVERNOR"

Without commenting upon the obvious irregularity of the form of the document attached to the certificate of the Secretary of State, it is sufficient to state that it is not evidence of such regularity and conclusiveness as to justify a Chancellor or this Court in setting aside, not only the actions of the elected representatives of the people in the General Assembly, but also the actions of a duly elected constitutional convention and the subsequent approval of the people themselves. This Court takes judicial notice that the original engrossment of all legislative acts are deposited with the Secretary of State.

[7]

The best evidence upon so delicate and important question as to the existence of a signature thereon would be a certified photostatic copy of the original, uninterrupted by insertion of letters and unaltered by marginal notations. This fact alone was enough to give pause to the Chancellor and justify him in waiting for more satisfactory evidence of the true facts.

This Court concurs in the ruling of the Chancellor that a summary judgment should not be granted on the basis of the certificate of the Secretary of State in the form described.

The defendants insist that the jurisdiction of the Chancellor in respect to the dispute expired before his decision. It is true, as insisted by defendants, that T.C.A. §2-1702 requires that election contests be tried within fifty (50) days after the filing of the complaint. Plaintiff's motion for summary judgment was not filed until May 12, 1978, more than fifty (50) days after the filing of the complaint on March 15, 1978. Even after the motion was filed, there is no evidence in the record that plaintiff made an effort to obtain an expedited hearing. This

Court would be reluctant to deny relief because a court was unable to try and decide an election contest within fifty (50) days. However, if the plaintiff in such a case does not do his best to obtain a timely decision, then a denial of relief is in order under the statute.

Thus, this Court concurs in the insistence of defendants that plaintiff's failure to move aggressively for disposition within the statutory period had disentitled plaintiff to the relief prayed for. If this Court and the Chancellor should be in error as to the existence of issues of fact, the plaintiff

[8]

was nevertheless not entitled to a summary judgment because of the delay.

Defendants next insist that there is no requirement that the Governor sign a legislative call for a constitutional convention.

Article II, Section 18, Constitution of Tennessee, reads in pertinent part as follows:

> ". . . No bill shall become *a law* until it . . . shall have received the approval of the Governor, or shall have been otherwise passed under the provisions of this Constitution." (Emphasis supplied)

Article III, Section 18, Constitution of Tennessee, reads in pertinent part as follows:

> ". . . Every Bill which may pass both Houses of the General Assembly shall, before it becomes *a law*, be presented to the Governor for his signature . . . .

Appendix A

Every joint resolution or order (except on question of adjournment and proposals of specific amendments to the Constitution) shall likewise be presented to the Governor for his signature, ..." (Emphasis supplied)

Article XI, Section 3, Constitution of Tennessee, reads in pertinent part as follows:

". . . Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, . . . and referred to the general assembly then next to be chosen; . . . and if in the general assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by *two-thirds* of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people at the next general election in which a Governor is to be chosen . . . .

The Lesiglature shall have the right *by law* to submit to the people, at any general election, the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform or abolish any specified part or parts of it; . . . ." (Emphasis supplied)

[9]

This Court cannot agree with defendants that the Constitution does not require the signature of the Governor on a measure submitting to the voters the question of calling a constitutional convention, even a limited constitutional convention such as that involved in the present suit. There are two reasons for this position.

First, Article XI, above, provides that the legislature may by law submit a proposal for a constitutional convention. That is what happened in the present case. Articles II and III, above, require that every bill shall be presented to the Governor before it becomes a law. Therefore, before the action of the legislature in the present case could become a law, it was necessary that it be submitted to the Governor. Not having been so submitted, it could not become a law, and the action of the legislature, not being accomplished by law, was not taken in compliance with the constitution.

The other reason why the Governor's signature is required is likewise based upon the same two provisions of the Constitution. Article III, Section 18, quoted above, provides that all other actions of the legislature (joint resolutions or orders) shall be presented to the Governor, except on question of adjournment and proposals of specific amendments to the Constitution. It cannot be successfully contended that the submission to the voters of a proposal for a limited constitutional convention is contemplated by the exemption just mentioned. In the first place, the proposal of a convention was not a proposal of specific amendments, but of a convention to consider amendment in specific areas. In the second place, Article XI, quoted above, specifies two separate and distinct methods of amending

[10]

the constitution, viz:

> (1) Proposals by two successive legislatures of specific amendments directly to the voters without a convention. Such proposal is not required to be made by law, but by a (simple) majority of the respec-

tive houses "agreeing" to a proposal followed by agreement of two thirds majority of each house of the next legislature. Such action is exempt from the requirement of submission to the Governor.

(2) Submission to the voters of the question of calling a convention is to be accomplished by law at a single session of the legislature without any requirement for two thirds approval of a subsequent legislature.

It is thus seen that the framers of the Constitution were willing to allow the Legislature to submit proposals for specific amendments to the voters without concurrence of the Governor under the unusual requirements of action by successive legislatures and two thirds majority vote by the second legislature. For this reason, the specific amendment proposal was exempted from the general requirement of Article III that "Every joint resolution or order . . . be presented to the Governor for presentation." No such exemption is intended for a single majority action of the Legislature authorizing a referendum.

This Court holds that the legislative action involved in the present case should have been presented to the Governor as required by Section III. An entirely different issue is whether such omission, if it occurred, would invalidate the first action of the voters, approving the convention, the action of the convention elected by the voters and the final action of the voters in approving the results of the convention.

Even if the evidence should show conclusively (as required for a summary judgment) that the action was not presented to the Governor, this Court is unwilling at this late date to

[11]

invalidate the amendments to the Constitution which have been proposed by a convention called upon approval of the voters of the State who also have given final approval to the amendments. Judicial interference with the orderly framework of government as approved by the voters of the State is simply not justified by an omission which cannot be said to have interfered with the free exercise of the rights of the people of the State to change the form of their government. Article I, Section I, Constitution of Tennessee. *Snow v. City of Memphis*, Tenn. 1975, 527 S.W.2d 55, and authorities cited therein.

It is worth repeating at conclusion that this is an appeal from an order overruling plaintiff's motion for a summary judgment. After the denial of her motion, plaintiff chose not to participate further in the investigation of the issues of fact, as ordered by the Chancellor, but failed to respond to a discovery order resulting in the ultimate dismissal of plaintiff's suit without a hearing on the merits.

Plaintiff does not have strong grounds for her complaint against such a background.

The decree of the Chancellor is affirmed. Costs of this appeal are taxed against plaintiff-appellant. The cause is remanded to the Chancellor for collection of costs and such other proceedings, if any, as may be necessary and proper.

Affirmed and remanded.

/s/ HENRY F. TODD
Henry F. Todd, Judge

Drowota, J., Concurs

Blackburn, J., Concurs

APPENDIX B

1978 SPECIAL ELECTION

ARTICLE	SECTION	FOR	T.C.A. vol. I PAGE
II	8	249,768	420
	15	260,852	425
	18	257,077	486
	24	247,091	502
III	4	218,600	588
	18	243,013	600
IV	1	266,519	602
VI	1-15	Defeated	
VII	1	195,183	694
	2	166,728	696
XI	7 (interest)	222,779	739
	11 (homestead)	282,215	804
	12	237,912	817
	14	199,742	823

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CORNELIA CRENSHAW Plaintiff-Appellant	)	
VS.	)	NO. ___ CA NO. 79-13-1
HONORABLE RAY BLANTON, Governor of Tennessee and GENTRY CROWELL Defendants-Appellees	)	Davidson Equity

NOTICE OF APPEAL

Notice is hereby given that the plaintiff-appellant, Cornelia Crenshaw, hereby appeals to the Supreme Court of the United States from a judgment of the Supreme Court of Tennessee entered on the 19th day of May, 1980, denying her permission to appeal from a judgment of the Court of Appeals of Tennessee entered on the 28th day of March, 1980, which denied her summary judgment declaring the act of the Tennessee Legislature unconstitutional and all resulting acts therefrom, including amendments to the Constitution of the State of Tennessee.

Said appeal is pursuant to 28 U.S.C., Section 1257(2).

This the 24th day of July, 1980.

/s/ HUBERT D. PATTY
Hubert D. Patty, Attorney for
Cornelia Crenshaw, Plaintiff-Appellant

[Certificate of Service Omitted]

No. 80-235

Supreme Court, U. S.
FILED
SEP 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CORNELIA CRENSHAW,
Plaintiff-Appellant,

vs.

HONORABLE RAY BLANTON,
Governor of Tennessee; and
GENTRY CROWELL,
Defendants-Appellees.

On Appeal from the Supreme Court of Tennessee

MOTION OF APPELLEES TO DISMISS OR AFFIRM

WILLIAM W. HUNT, III
Assistant Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-1935
Attorney for Defendants-Appellees

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CORNELIA CRENSHAW,
Plaintiff-Appellant,

vs.

HONORABLE RAY BLANTON,
Governor of Tennessee; and
GENTRY CROWELL,
Defendants-Appellees.

On Appeal from the Supreme Court of Tennessee

MOTION OF APPELLEES TO DISMISS OR AFFIRM

The Appellees, Honorable Ray Blanton and Gentry Crowell, respectfully move to dismiss or affirm the judgment of the Supreme Court of the State of Tennessee, Rule 16, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

The instant action was filed in the Tennessee state courts as an election contest, contesting the results of the March 7, 1978 referendum on the constitutional amendments proposed by the Limited Constitutional Convention of 1977. Appellant has attacked this referendum on numerous grounds, only two of

which are relevant to the instant appeal: (1) the alleged failure of the Governor to sign the call for the constitutional convention (Chapter 848, Public Acts of 1976); and (2) the alleged failure of the Speakers of the House and Senate to sign this call while the General Assembly remained in session. In the Davidson County Chancery Court the Plaintiff (Appellant here) filed a motion for summary judgment, citing these two grounds. This motion was dismissed with the Chancellor finding that there remained questions of law and fact with respect to these issues.

Prior to the decision on the motion for summary judgment, the Defendants propounded interrogatories pursuant to the Tennessee Rules of Civil Procedure. Despite repeated orders compelling discovery, the Chancellor found Plaintiff's answers to the interrogatories to be insufficient and dismissed the case.

Plaintiff thereafter appealed to the Supreme Court of Tennessee, pursuant to the statutes governing election contests, T.C.A. § 2-17-101, *et seq.* The cause was transferred to the Court of Appeals where Plaintiff raised only the issue of the Chancellor's denial of her motion for summary judgment. This action of the Chancellor was affirmed by the Court of Appeals. (Opinion p. 11). Yet, while affirming the decision of the Chancellor denying Plaintiff's motion for summary judgment, the Court of Appeals included in its opinion a substantial amount of dicta dealing with the issues in Plaintiff's summary judgment motion, and expressing the view that the Governor is required to sign all calls for constitutional conventions. (Opinion pp. 8-11).

The Supreme Court of Tennessee, on May 19, 1980, denied the Appellant's application for permission to appeal in this cause. Appellant thereafter, citing as basis of jurisdiction, 28 U.S.C. § 1257(2), appealed to this Supreme Court, allegedly arguing that the constitutional amendments of the Tennessee Constitution, recently ratified by the voters of Tennessee, are in violation of the United States Constitution.

MOTION TO DISMISS

The Appellees hereby move to dismiss the appeal on the grounds that this Court lacks jurisdiction to hear this cause. In support of this motion the Appellees would argue as follows:

I.

The Appellant Is Not Appealing From A Final Judgment.

Plaintiff is not properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(2). That statute provides as follows:

> "*Final judgments* or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, *and the decision is in favor of its validity.*" (Emphasis added).

As stated on page two of Appellant's jurisdictional statement, this appeal arises from a denial of appellant's motion for summary judgment in Chancery Court. The Court of Appeals of Tennessee upheld the denial, and the Supreme Court of Tennessee refused to grant certiorari. The opinion of the Court of Appeals, Appendix A, page 13, states as follows:

> "The plaintiff, Cornelia Crenshaw, has appealed from the Chancellor's decree dismissing her suit challenging the validity of Chapter 848, Public Acts of 1976 . . .
>
> "The immediate precipitating cause of the dismissal was plaintiff's failure to properly respond to defendant's demand and the Chancellor's order for discovery. Appellant

> makes no question of the final action of the Chancellor, but asserts as error the previous action of the Chancellor in overruling plaintiff's motion for summary judgment."

Numerous state cases support the proposition that a ruling on a motion for summary judgment is not a trial on the merits, but is instead a determination of whether a triable issue in fact exists. See, e.g., *Conley* v. *Hall,* 395 S.W.2d 575 (Ky. 1965); *Reed* v. *Kaydon Engineering Corp.,* 196 N.W.2d 487 (Mich. 1972); *Cook* v. *Schiff,* 279 N.Y.S.2d 585, 28 A.D.2d 514 (N.Y. 1967); *Reed* v. *Davis,* 399 P.2d 338 (Wash. 1965); *Horst* v. *Kraft,* 231 A.2d 674 (Md. 1967); *Eaton* v. *Miller,* 250 A.2d 220 (Me. 1969). The denial of a motion for summary judgment is not a decision on the issue requiring trial. *Moyer* v. *Moyer,* 134 A.2d 649 (D.C. 1957); *Hays* v. *Sullins,* 442 S.W.2d 494 (Tex. 1969); *Snelwar* v. *Snelwar,* 212 N.Y.S.2d 882, 27 Misc.2d 933 (N.Y. 1961). An order denying summary judgment decides only that questions of fact exist to be determined at trial. *Swanson* v. *Ridge Tool Co.,* 178 N.E.2d 255 (Ohio 1961); *West* v. *West,* 387 P.2d 686 (Utah 1963).

Appellant's motion for summary judgment was denied, whereupon appellant refused to comply with the Chancellor's discovery order and failed to proceed properly to trial, resulting in the dismissal of appellant's suit. Appellant cannot now be heard to challenge the dismissal, based upon a ruling on a motion for summary judgment which did not constitute a final judgment. Appellant, in essence, is challenging the ruling on her motion for summary judgment, which ruling did not amount to a final judgment as required for appeal under 28 U.S.C. 1257(2). Furthermore, whereas appellant's suit was dismissed for failure to comply with a discovery order, there was no final decision "in favor of [the statute's] validity," as is also required under 28 U.S.C. § 1257(2).

II.

The Decision Was Based On An Independent State Ground

At any rate, the Court of Appeals indicated that, because of the appellant's failure to produce reliable evidence, there remains an undetermined issue of fact as to whether the bill actually was presented to the Governor, (Appendix A, p. 23), and when it was signed in the Senate (Appendix A, p. 17).

The appellant, during the hearing on the motion, failed to offer reliable proof that the bill was not presented to the Governor. Such issues of fact are to be determined in the trial court, not on appeal to the Supreme Court. See, e.g., *United States* v. *Johnston,* 268 U.S. 220, 227; *Graves Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275; *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635. Because of appellant's failure to properly present her case before the Chancellor, her suit was dismissed without a ruling on the merits of whatever federal question she raised. Thus, there was an independent, non-federal basis for dismissal of appellant's suit and affirmance of that dismissal.

III.

The Question Presented To This Court Has Not Been Presented To The State Courts Below

No court has ruled on the federal question appellant raises. When the highest state court fails to pass upon a federal question, it is assumed that the omission is due to appellant's failure to properly present the question in the state courts. Appellant, under Supreme Court Rule 15(1)(d), has the burden of showing how and when the federal question was properly raised at both the trial and the appellate courts. See, e.g., *Street* v. *New York,* 394 U.S. 576, 582; *Bailey* v. *Anderson,* 326 U.S. 203, 206-207. Appellant surely cannot show, in light of her failure to properly proceed at trial, that her federal question was properly raised.

IV.

The Federal Question Presented Below Is Not Substantial

Appellant has failed to show that her federal question is substantial. Even if the bill to authorize the referendum was not signed by the Governor, the referendum was nonetheless properly conducted, and the convention's proposals were properly passed. Other than the mere allegation that her due process rights were violated, appellant has not shown in what manner the act to which she objects violates those rights. Supreme Court Rule 15(1)(e) provides as follows:

> "(e) If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial . . . [which] shall include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution."

Appellant has alleged some supposed violations of state law, for which she offered what was, at best, inconclusive proof at the trial court. As an afterthought, the appellant states, without citing any authority and without giving any presentation as to substantiality of or grounds for her claim, that it is clear "from prior decisions of the Supreme Court of the United States," whatever these may be, that passage of the Act in question deprives the citizens of Tennessee of their Fourteenth Amendment rights. This presentation certainly does not meet the requirements of Rule 15(1)(e).

V.

There Is No Denial Of Federal Due Process.

It is well accepted that federal courts must "not overstep the boundaries which limit its own jurisdiction." *Luther* v. *Borden,* 48 U.S. 1, 12 L.Ed. 581 (1849). See also, *In Re: Duncan,* 139

U.S. 449, 35 L.Ed. 219, 11 S.Ct. 573 (1891). It is further accepted that federal courts must accept the construction of state's statutes by state courts. See, *Montana* v. *Rice,* 204 U.S. 291, 51 L.Ed. 490, 27 S.Ct. 281 (1907); *Coleman* v. *Alabama,* 399 U.S. 1, 26 L.Ed.2d 387, 90 S.Ct. 1999 (1969); *Hortonville Joint School District* v. *Hortonville Education Association,* 426 U.S. 482, 49 L.Ed.2d 1, 96 S.Ct. 308 (1976).

The question of whether the governor must sign the call for the constitutional convention is one for interpretation by the state courts. It is the position of the appellees that for this Court to consider this matter, this Court must find that the state courts had made a decision that the constitutional amendments were validly enacted. This is an interpretation of a state constitutional provision by the state supreme court. There is no federal constitutional requirement that calls for a constitutional convention must be signed by the governor, or that the speakers must sign this call while the General Assembly remains in session. Appellant must argue, for this Court to hear this matter, that the alleged failure of the constitutional amendment to be properly signed by the speakers of the relative Houses and by the governor, violates established Tennessee law and, therefore, that due process is denied to the citizens of Tennessee since such amendments were not enacted pursuant to the requirements of established Tennessee law. This is not a federal question. Appellees would repeat their insistence that the question of whether state law had been violated has not been decided, and if this Court decides that it has been decided, by implication, it must be inferred that the State Supreme Court has decided that the constitutional provision regarding amending the state constitution had not been violated. The state courts would have then interpreted their state constitution. There is no federal constitutional due process requirement that the call be signed by the governor and, therefore, the question is without merit.[1]

[1] Appellant cites *Taylor* v. *Becham,* 178 U.S. 158, 44 L.Ed. 1187, 20 S.Ct. 890 (1900) in support of his argument that due process has been denied here. Appellees have perused this case and find no support for appellant therein. In fact, the case supports appellee's position as it determines in this election contest that the situation is one belonging to the state supreme court for a decision.

CONCLUSION

Since no federal question is presented; since Appellant has shown no substantial federal question to exist; since Appellant is not appealing from a final judgment; since the decision of the state courts was based on an independent state ground; and since the question presented here has not been presented to the courts below, the Appellees would respectfully request that this appeal either be dismissed or affirmed.

Respectfully submitted,

WILLIAM W. HUNT, III
Assistant Attorney General

Acknowledgement is given to Richard L. Colbert, graduate of the University of Tennessee, College of Law, who has assisted in the preparation of this Motion.

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing Motion of Appellees to Dismiss or Affirm, has this date been forwarded by first class, postage paid mail, to attorney for the Appellant, Mr. Hubert D. Patty, Attorney at Law, P. O. Drawer L, Maryville, Tennessee 37801, this 12th day of September, 1980.

WILLIAM W. HUNT, III
Assistant Attorney General